

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Applications for Consent to the Assignment)	
and/or Transfer of Control of Licenses)	
)	
Adelphia Communications Corporation,)	
Assignors,)	
to)	
)	
Time Warner Cable Inc. (subsidiaries),)	
Assignees;)	
)	
Adelphia Communications Corporation,)	
Assignors and Transferors,)	MB Docket No. 05-192
to)	
)	
Comcast Corporation (subsidiaries),)	
Assignees and Transferees;)	
)	
Comcast Corporation, Transferor,)	
to)	
Time Warner Inc., Transferee;)	
)	
Time Warner Inc., Transferor)	
to)	
Comcast Corporation, Transferee.)	

REPLY COMMENTS OF TCR SPORTS BROADCASTING HOLDING, L.L.P.

Dated: August 5, 2005

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The comments filed in this proceeding confirm that Comcast's proposed acquisition of Adelphia threatens grave harm to independent programming networks (particularly regional sports networks ("RSNs")), competing multi-channel video programmer distributors ("MVPDs"), and consumers. Indeed, in just the two weeks since initial comments were filed in this proceeding, Comcast's incentive and ability to act anticompetitively have been further exposed. On July 27, 2005, Comcast's sole basis for refusing to carry Washington Nationals games on its cable systems was rejected by a Maryland court. *Comcast SportsNet Mid-Atlantic L.P. v. Baltimore Orioles L.P. et al.*, Civil Action No. 260751-V (Md. Cir. Ct. filed July 27, 2005) ("CSN Md. Action"). Comcast had refused to carry Nationals games on the grounds that TCR, which owns the rights to produce and exhibit such games, breached its contract with Comcast by deciding to maintain the rights to produce and exhibit the Baltimore Orioles by itself, rather than assigning those rights to Comcast's competing regional sports network, Comcast SportsNet ("CSN"). Although this claim – which was an obvious pretext from the start – has now been rejected, Comcast has continued to refuse to carry the Nationals and will not even engage in meaningful negotiations. Particularly in light of Comcast's flagrant abuse of market power, the Commission must not permit Comcast to increase its market power still further. Because the acquisition of Adelphia would have precisely that effect, if the Commission is to permit this merger, it must – at a minimum – impose stringent conditions which ensure that Comcast will not be able to continue and expand its anticompetitive practices.

I. The Comments Confirm that Comcast Has The Incentive and Ability To Act Anticompetitively in Regional Sports Programming Markets

TCR explained in its opening comments that there is a distinct market for "regional sports cable networks" that is "regional" in scope. *See* TCR Comments at 3; *DirecTV/News Corp.*

¶¶ 57, 60, 66.¹ TCR further demonstrated that, insofar as this transaction is concerned, there is a relevant market that consists of the Orioles' and Nationals' shared home territory throughout which TCR is seeking to distribute its programming, and that the areas of principal concern within this territory are the Washington and Baltimore DMAs. *See* TCR Comments at 4-5. Comcast is already the largest cable operator and MVPD provider in these DMAs, and Adelphia is the third largest cable operator in these DMAs. Thus, the transaction will increase Comcast's share of MVPD households in the Baltimore and Washington DMAs that are the heart of the Orioles' and Nationals' shared television territory and thereby increase Comcast's incentive and ability to discriminate in favor of affiliated programming. *See* Sidak/Singer Decl. ¶¶ 33-37.

The comments of other parties confirm all of this. First, they demonstrate that regional sports programming constitutes a relevant market. As DirecTV explains, there is a separate relevant market for "RSN programming," and the relevant geographic market for such programming is "regional." DirecTV at 6-8; *see id.* at 8 ("Because contracts between each sports team and an RSN limit the distribution of the content to a specific 'distribution footprint' outside of which subscribers cannot view the team's games, the Commission in two recent cases found it reasonable to define the relevant geographic market for each RSN as the RSN service area."). EchoStar, RCN, a number of consumer groups, and others likewise explain the importance of analyzing separate markets for regional sports programming. *See* EchoStar at 4-6; RCN at 11-15; Media Access Project at 10-11; CWA/IBEW at 9.

¹ General Motors Corporation and Hughes Electronics Corporation, Transferors And The News Corporation Limited, Transferee, For Authority to Transfer Control, Memorandum Opinion and Order, 19 FCC Rcd 473 (2004) ("DirecTV/News Corp."); *see also Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferee*, Memorandum Opinion and Order, 17 FCC Rcd. 23246, ¶ 63 (2002) ("AT&T/Comcast") (analyzing separate market for regional programming); *The Commission's Cable Horizontal and Vertical Ownership Limits*, Second Further Notice of Proposed Rulemaking, 20 FCC Rcd 9374, ¶ 70 (2005) ("We also believe that regional markets may be relevant when considering programming, such as regional sports and news networks, that is only of interest to, or available in, a particular region.").

Second, the comments confirm that the transaction will greatly increase Comcast's market power for a number of regional markets, including the Baltimore and Washington metropolitan areas that are of most serious concern to TCR. For example, DirecTV performs an HHI analysis indicating that, in the relevant geographic area served by the Mid-Atlantic Sports Network (the trade name under which TCR is doing business), the HHI will increase from 1,810 to 2,169, an increase of 359 points. *See* DirecTV at 9-10; *see also* CWA/IBEW at 9-10, 13-14. Under traditional antitrust analysis, increases of this magnitude raise serious concerns. *See* Merger Guidelines § 1.51;² *Applications of Ameritech Corp., Transferor and SBC Communications Inc., Transferee*, Memorandum Opinion and Order, 14 FCC Rcd 14712, ¶ 122 & n.239 (1999). Echostar and RCN – both of which have been the victim of Comcast's anticompetitive tactics – likewise draw attention to the transaction's effect on the regional markets in which MASN is seeking to distribute its programming. *See* EchoStar at 6; RCN at 13-14.

Third, and finally, the comments confirm that Comcast has both the incentive and ability to act anticompetitively, both by denying carriage to unaffiliated RSNs like TCR, and also by withholding affiliated RSNs from competing MVPDs. For example, RCN explains its struggles obtaining access to Comcast's affiliated RSN in Philadelphia. RCN did not make such programming available until Comcast faced DOJ review of Comcast's acquisition of another RSN in the Washington, DC area, and even then made it available only on a short-term basis. Although RCN eventually signed a long-term contract, Comcast requires it to pay much higher

² The U.S. Department of Justice and Federal Trade Commission, 1992 Horizontal Merger Guidelines (revised Apr. 8, 1997).

rates than Comcast's own affiliates. *See* RCN at 11-12; *see also* CWA/IBEW at 17-18.³ As DirecTV explains, Comcast has yet to make its regional sports network in Philadelphia available to satellite providers, and as a result "DirecTV's market share in the Philadelphia DMA is significantly lower than its market share nationwide." DirecTV at 17; *see also* EchoStar at 5. Comcast also is employing similar anticompetitive tactics in other markets (such as Chicago and San Francisco), charging satellite providers exorbitant and discriminatory rates for the right to carry Comcast's affiliated RSNs. *See* DirecTV at 20-21, 23-25.

II. Recent Events Involving the Washington Nationals Confirm Comcast's Penchant To Act Anticompetitively

As TCR explained in its opening comments, Comcast's incentives and ability are not merely a theoretical concern, but are borne out by Comcast's ongoing refusal to carry Washington Nationals baseball games. Comcast has attempted to justify this refusal by claiming that TCR breached Comcast's contractual rights. As Comcast tells it, CSN possessed exclusive rights to negotiate for Orioles games following the conclusion of the 2006 season, and TCR supposedly breached those rights by transferring the Orioles games to TCR (doing business as Mid-Atlantic Sports Network ("MASN")). As Comcast could have – and should have – realized before filing a frivolous lawsuit, MASN is simply a trade name registered by TCR; it is not, as Comcast appears to have assumed, a distinct legal entity. TCR accordingly did not license the production and exhibition rights to Orioles games for 2007 and beyond to *anyone*; it simply kept those rights for itself. Despite the fact that TCR's counsel informed Comcast's counsel that MASN was not a distinct legal entity, which thereby rendered Comcast's claims to be baseless, Comcast decided to file a breach-of-contract lawsuit against TCR.

³ RCN also describes (at 14-15) Comcast's attempts to prevent its competitors from obtaining access to regional news programming in Boston.

On July 27, 2005, a Maryland court dismissed Comcast's lawsuit as baseless.⁴ The court found that, based on the "plain language and meaning" of the agreement between Comcast and TCR, Comcast had failed to state a claim for which relief could be granted.⁵ As a result of this ruling, Comcast no longer has any excuse for its refusal to carry Nationals games, and its failure to do so can be understood only as an anticompetitive act. Indeed, Comcast has not merely refused to carry the Nationals, but has refused to engage in any meaningful negotiations about such carriage.⁶

III. The Comments Confirm that Conditions Are Both Necessary and Appropriate

TCR explained in its opening comments that, in previous mergers of MVPD providers, the Commission imposed conditions specifically designed to ensure that the combined company did not discriminate against unaffiliated RSNs. *See* TCR Comments at 18; *DirecTV/News Corp.* ¶ 72. TCR further explained that these previous mergers involved considerably less concentration and potential for abuse than the instant transaction, and that if the Commission is to approve this transaction at all, it must, at a minimum, impose even more stringent conditions that ensure that Comcast will end its discriminatory practices against unaffiliated RSNs. TCR believes the most effective remedy would be to require Comcast to divest its interest in its regional sports network, CSN, and to require Comcast to carry TCR's programming on just and reasonable terms. In the alternative, the Commission should, at a minimum, prohibit Comcast from (1) requiring a financial interest in any video programming service that it considers carrying; (2) coercing other content providers to provide exclusive rights against any other

⁴ Transcript of Decision, *CSN Md. Action*.

⁵ *Id.* at 119.

⁶ Attachment A to these reply comments contain TCR's reply to Comcast's answer to the carriage agreement complaint that TCR filed with this Commission. That reply provides additional explanation about why Comcast's justifications for refusing to carry the Nationals are baseless.

MVPDs; (3) denying affiliated regional sports programming to rival MVPDs; and (4) engaging in conduct that would unreasonably restrain the ability of a competitor to compete fairly by discriminating on the basis of a video programming vendor's affiliation or nonaffiliation with Comcast. Specifically with respect to this last condition, the Commission should require Comcast to carry TCR's programming on just and reasonable terms to be established by the Commission or through binding arbitration.

The comments support the imposition of similar remedies. For example, DirecTV explains that the Commission should prohibit Comcast from entering into or continuing to maintain an exclusive agreement with an RSN, and from causing, directly or indirectly, an RSN to refuse to deal with a rival MVPD. *See* DirecTV at 44; *see also* EchoStar at 12-13; RCN at 19. The Media Access Project proposes that Comcast "offer leased access at a set rate, designed to promote competition rather than to compensate Applicants for carriage." Media Access Project at 41. It also requests that the Commission adopt an "expedited complaint process to resolve anticompetitive conduct or abuse of market power," which would help to prevent Comcast from "becoming arbiter[] of what ideas may or may not reach cable viewers." *Id.* at 46.

IV. Conclusion

For the reasons discussed above and in TCR's initial comments, the Commission should impose conditions on Comcast to ensure that it does not discriminate against unaffiliated RSNs, or, in the alternative, deny the merger with respect to Comcast's acquisition of Adelphia's assets in the Orioles' and Nationals' television territory.

Respectfully submitted,

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